

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10684 OF 2023

- 1. Puneet Satpal Malhotra**
Age-69 years, Occupation-Business,
Residing at 116, Koregaon Park,
Pune-411 001
- 2. Ankush Puneet Malhotra**
Age-45 years, Occupation-Business,
Residing at 116, Koregaon Park,
Pune-411 001
- 3. Vidur Puneet Malhotra**
Age-40 years, Occupation-Business,
Residing at 116, Koregaon Park,
Pune-411 001
- 4. Siya Puneet Malhotra**
Age-34 years, Residing at 116,
Koregaon Park, Pune-411 001
- 5. Seema Puneet Malhotra**
Age-68 years, Occupation-Housewife,
Residing at 116, Koregaon Park,
Pune-411 001

... Petitioners

V/s.

- 1. Mukesh Satpal Malhotra**
Age-71 years, Occupation-Business,
Residing at: A-9, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014
- 2. Ritu Mukesh Malhotra**
Age-69 years, Occupation-Housewife,

Residing at: A-9, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

3. Akshay Mukesh Malhotra

Age-47 years, Occupation-Business,
Residing at: 12 Pushpak Society,
Kalyaninager, Pune-411 001

4. Shikha Nishchay Goel

Age-45 years, Occupation-Housewife,
Residing at: A-9, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

5. Urvashi Sunil Sahani

Age-67 years, Occupation-Educationalist,
Residing at: A-304, Santushti Apartments,
7A, Vivekananda Marg, Lucknow,
Uttar Pradesh-226 001

6. Shibani Sunil Sahani

Age-46 years, Occupation-not known,
Residing at A-304, Santushti Apartments,
7A, Vivekananda Marg, Lucknow,
Uttar Pradesh-226 001

7. Nidhi Harsh Mishra

Age-45 years, Occupation-not known,
Residing at: A-304, Santushti Apartments,
7A, Vivekananda Marg, Lucknow,
Uttar Pradesh-226 001

8. Ashwini Baldevraj Malhotra

Age-64 years, Occupation-Business,
Residing at: A-8, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

9. Pooja Rohit Sood

Age-52 years, Occupation-Business
R/at: S-155 2nd Floor Panchasheel Park,
New Delhi-110 017

10. Siddharth Sood

Age: Adult, Occu: Business,
Address at: S-115, 2nd Floor,
Panchsheel Park, New Delhi-110 017

11. Suryaveer Sood

Adult, Occu: Business,
Address at: S-115, 2nd Floor,
Panchsheel Park, New Delhi-110 017

12. Avanti Malhotra Rai

Age: Adult, Occu: Business,
Address at: A-8, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

13. Priti Ashwini Malhotra

Age: Adult, Occu: Business
Address at: A-8, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

14. Saachi Malhotra

Age: Adult, Occu: Business
Address at: A-8, Forest Park Society,
Nagar Road, Lohegaon, Pune-411 014

... Respondents

Dr. Veerendra Tulzapurkar, Senior Advocate with Mr. Rohan Kelkar with Mr. Kartikeya Desai with Ms. Rashi Shah i/by M/s. Kartikeya & Associate for the petitioners.

Mr. Vineet Naik, Senior Advocate with Mr. Gaurav Mehta i/by Bachubhai Munim & Co. for the respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 16, 2023

P.C.:

1. This writ petition is directed against the order dated 18th July 2023 passed by Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.1254 of 2014, holding that the document described as "Memorandum of Partition" dated 30th March 1985 tendered to the Court and admitted in evidence cannot be impounded.

2. The material facts briefly stated are as follows:

The petitioners/original plaintiffs filed Special Civil Suit No.1254 of 2014 seeking relief of partition and separate possession. In the written statement, the respondents contended that the Satpal Malhotra HUF was orally partitioned on 29th March 1985, which is recorded in the memorandum of partition dated 30th March 1985.

The trial commenced on 25th November 2021 when petitioner No.1 filed his affidavit of evidence. During cross-examination, on 29th September 2022, petitioner No.1 was inter alia confronted with a memorandum of partition dated 30th March 1985 (Exhibit-299) and a memorandum of partition dated 30th March 1985 (Exhibit-301). Since the petitioner was confronted with aforesaid documents, the Trial Court admitted Exhibit-299 and Exhibit-301 in evidence. Petitioner No.1's cross-examination was concluded on 17th February 2023.

On 30th June 2023, the petitioners filed an application seeking prayer of impounding memorandum of partition dated 30th March 1985 (Exhibit-299). Respondent No.1, on 3rd July 2023, filed a reply opposing the application, contending that the

petitioners did not raise any objection when the document was produced and admitted in evidence. The petitioners have, therefore, waived their right to raise such objection. Once the document is admitted in evidence, it cannot be impounded. On 18th July 2023, the Trial Court rejected the petitioners' application. Hence, the petitioners have filed a present writ petition.

3. Dr. Tulzapurkar, learned Senior Advocate for the petitioners, took me through the contents of the memorandum of partition dated 30th March 1985, and in particular, clauses 1, 3, 4, 5 and 7. He submitted that the said clauses clearly indicate that the document effects partition. He submitted that the bar contained under section 35 of the Maharashtra Stamp Act, 1958, takes away the Court's power to question the instrument's admission in evidence. However, the petitioners' application to impound the instrument is under section 33 of the Maharashtra Stamp Act, 1958, which confers independent duty on the Court irrespective of its admission in evidence. He submitted that a verified copy of the original memorandum of partition was produced on record, and the original was withdrawn. Verified copy is not an instrument under section 2(14) of the Maharashtra Stamp Act, 1958.

4. Per contra, Mr. Vineet Naik, learned Senior Advocate for the respondent submitted that once the memorandum of partition dated 30th March 1985 was produced and admitted in evidence, the petitioners were precluded from raising objections about the insufficiency of the stamp. Section 35 of the Act precludes the party or Court from raising such objection. Parties' action and conduct needs to be considered for interpreting the document in

question. In the facts of the case, oral partition took place on 29th March 1985, and the document merely recorded said fact. He invited my attention to various clauses of the document, including paragraph Nos.8 and 10. He submitted that Late. Satpal Malhotra addressed a letter dated 12th April 1985 stating that the said HUF no longer exists with effect from 29th March 1985. This document has been filed by respondent No.1 with his evidence affidavit. Therefore, the document in question is a memorandum of partition.

5. To appreciate the point in issue, it may be expedient to set out the relevant provisions of the Maharashtra Stamp Act, 1958.

Section 2(m) “instrument of partition” means any instrument whereby co-owners of any property divide or agree to divide such property in severalty and includes,— (i) a final order for effecting a partition passed by any revenue authority or any civil court, (ii) an award by an arbitrator directing a partition, and (iii) when any partition is effected without executing any such instrument, any instrument or instruments signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners ;

Chapter IV deals with "instrument not duly stamped". Section 33 provides for the examination and impounding of sufficiently stamped documents. Section 33 of the Maharashtra Stamp Act, 1958 reads as under:

“33. (1) *Subject to the provisions of section 32A, every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police or any other officer, empowered by law to investigate offences under any law for*

the time being in force, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, *if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law.*

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed.

Provided that—

(a) nothing herein contained shall be deemed to require any magistrate or Judge of Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973:

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court may appoint in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.”

6. Section 34 of the Maharashtra Stamp Act, 1958, provides that instruments not duly stamped shall be inadmissible in evidence. Section 34 of the Maharashtra Stamp Act, 1958, reads as under:

“34. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument:

Provided that,—

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of—

(i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and

(ii) a penalty at the rate of 2 per cent. of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument;

Provided that, in no case, the amount of the penalty shall exceed four times the deficient portion of the stamp duty;

(b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter IX of Part D of Chapter X of the Code of Criminal Procedure, 1973;

(d) nothing herein contained shall prevent the admission of any instrument in any Court when such

instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act;

(e) nothing herein contained shall prevent the admission of a copy of any instrument or of an oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clause (a) is paid.”

7. Section 35 of the Maharashtra Stamp Act, 1958, which circumscribed the powers of the Court after the document is admitted in evidence reads as follows:-

“35. Where an instrument has been admitted in evidence, *such admission* shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.”

58. (1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding 1[under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973,] makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under section 34, the Court to which appeals lie from, or reference are made by, such first mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and

determine the amount of duty with which such instrument is chargeable, 2[and may require,— (i) the party or person concerned to make the payment of the proper duty or the amount required to make up the same, together with a penalty under section 34, or payment of a higher duty and penalty than those paid, to itself or to the Collector ; and (ii) any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.]

(3) When any declaration has been recorded under sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and, where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.....”

8. A conjoint reading of Sections 33 and 35 of the Maharashtra Stamp Act, 1958, makes it clear that section 33 is enacted to achieve the objective of safeguarding the revenue of the State. It mandates every person specified in Sub-section (1) of section 33 who has by law authority to receive evidence before whom any instrument chargeable with duty is produced. If he is satisfied that such an instrument is not duly stamped, he is conferred with the power to examine the instrument so produced or common before him. Section 33 casts a duty on the authority of the Court to impound the document. Such duty is subject to section 32A only.

9. The object of section 33 is to protect the revenue and under this section the courts have been given power to examine the question and impound the instrument of their own motion. The jurisdiction of the court in this regard, therefore, does not depend

upon the raising of an objection by the parties. If the document has been admitted in evidence in the court without any objection being raised to its admissibility on the ground of its being unstamped or insufficiently stamped and if the court by inadvertence has not applied its mind to the question of admissibility, I do not see how the protection afforded to the revenue by S. 33 is lost to the state simply on the ground that the court did not apply its mind to it. In my opinion, a plain reading of the various sections of the Act referred to above leaves an impression that the revenue has to be protected by the court while admitting the document in evidence. If the document has been admitted in evidence which ought not to have been admitted without having been impounded, to restrict the applicability of S. 33 to a case where the court has not been called upon by the contesting party to examine the admissibility or otherwise of the document for want of stamp would be against the language and purpose of section 33 of the Act. Therefore the court, without judicial determination of insufficiency of stamp has written a specific order admitting the document or a case where the court inadvertently has failed to apply its mind on its own motion towards the question of admissibility, the court will not become functus officio. Holding court becoming functus officio after document is admitted in evidence *will* amount to putting a microscopic construction on Section 33 of the Act which can never be justified in view of the fact that the above section was enacted for protection of the revenue by the court where such protection has not been given or missed by the court.

10. Section 35 operates in the independent sphere and takes away the power of the Court once the instrument is admitted in evidence to question the admissibility of such document in evidence. The section is categorical in its language that when a document has once been admitted in evidence, such admission cannot be called into question at any stage of suit or proceedings on the ground that the instrument had not been duly stamped. The expression “admitted in evidence” means the act of allowing the document in as part of the evidence. However, if objected at that stage, it must allow the document in as a result of a judicial determination of the question, whether it can be allowed in evidence or not for want of stamp. In other words, on an objection a party raises, the court admitting document must consciously apply its mind to the question of whether the document is admissible in evidence. It may happen in some cases that a document, which is not admissible for want of stamp, is allowed by the court to be admitted in evidence for want of objection at that stage. However, the said section is subject to section 58 of the said Act. Duty under section 33 of the Act is not circumscribed by section 35 of the Act. The purpose of bar contained in section 35 of the Act is get over admission in evidence of the document despite prohibition under section 34. Thus, it is evident that section 35 confers finality to the order regarding the document's admission in evidence. However, it does not operate as a bar to impounding the same if the court, during the pendency of a suit, concludes that the document admitted in evidence is not duly stamped.

11. The Single Judge of this Court in the case of **Priya d/o**

Narayan Puthan vs. Parushuram Printers, Aurangabad and others reported in (2019) 5 Mah.L.J. 678 was considering a suit for specific performance of an agreement to sell. The agreement to sell was tendered in evidence and was exhibited by the Trial Court without objection by the other side. The petitioner filed an application contending that the agreement to sell was conveyance and needed to be impounded in accordance with sections 33 and 34 of the Maharashtra Stamp Act. This Court held that the consistent view taken by the Apex Court is that once a document is admitted, rightly or wrongly, in evidence, it is not permissible under section 36 of the Maharashtra Stamp Act, at any stage of suit or proceedings to reject such document and cannot be excluded from evidence. This Court held that the object of section 33 is to safeguard revenue, and section 35 of the Maharashtra Stamp Act only gives finality to the decision in regard to the admissibility of said document in evidence. However, it does not operate as a bar for the impounding of the said document, and, therefore, in my opinion, respondents have no right to contend that the authority under section 33 is precluded from impounding an insufficiently stamped document once it is admitted in evidence.

12. According to the petitioners, the document at Exhibit-299 is a partition deed, but according to the respondents, the document is a memorandum of partition. To adjudicate on the nature of the document, it is necessary to consider the judgment of the Apex Court in **Roshan Singh & Others vs. Zile Singh & Others**, reported in (2018) 14 SCC 814. The Apex Court, in that case, was

considering a document which was interpreted as a memorandum of partition based on the contents thereof. The Apex Court held that writing which merely recites that there has, in time past, been a partition would amount to a statement of fact that does not require registration. The Apex Court laid down parameters to adjudicate when the document can be termed a memorandum of partition or deed of partition. The Apex Court, in paragraphs Nos.9 and 10, held as under:

“9. It is well settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it requires registration under Section 17(1)(b) of the Act, a writing which merely recites that there has *in time past* been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right, and there would be no necessity of registering such a document. Two propositions must, therefore, flow: (1) A partition may be effected orally, but if it is subsequently reduced into the form of a document and that document purports by itself to effect a division and embodies all the terms of the bargain, it will

be necessary to register it. If it is not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists, which are mere records of a previously completed partition between the parties, will be admitted in evidence, even though they are unregistered, to prove the fact of partition.

10. The tests for determining whether a document is an instrument of partition or a mere list of properties, have been laid down in a long catena of decisions of the Privy Council, this Court and the High Courts. The question was dealt with by Vivian Bose, J. in *Narayan Sakharam Patil v. Coop. Central Bank* (1937 SCC OnLine MP 103). Speaking for himself and Puranik, J. the learned Judge relied upon the decisions of the Privy Council in *Bageshwari Charan Singh v. Jagarnath Kauri* (1931 SCC OnLine PC 86) and *Subramonian v. Lutchman* (1922 SCC OnLine PC 76) and expressed as follows: (*Narayan Sakharam Patil v. Coop. Central Bank* (1937 SCC OnLine MP 103, paragraph 10)

“10. It can be accepted at once that mere lists of property do not form an instrument of partition and so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to “create, declare, assign, limit or extinguish... any right, title or interest” in the property which is admittedly over Rs.100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated.”

13. The Apex Court, in paragraph No.15 held that the principle which emerges is that if the arrangement of compromise is one under which a person having an absolute title to the property

transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other.

14. In light of the parameters laid down by the Apex Court, I have scrutinised Exhibit 299. Clauses 1, 3, 4, 5, 7, 8, 10 read as under:

“1. The parties of the four parts further agree that all the assets and liabilities of the said Hindu Undivided Family of *Satpal Sitaram Malhotra* described in Schedule-A hereto annexed, of which the parties of the four parts are constitutents stand fully partitioned between them and the said HUF accordingly stands fully partitioned with effect from this date.

3. That it is further agreed that each of the four parties hereby releases his/her interest in the properties allotted to other parties and conveys to each of them separately his right, title and interest therein so as to constitute each party to this deed the sole and absolute owner of the property to this allotted to that party and discharge him/her from all claims and demands of the other thereto concerning therewith as from the date of this deed. The ownership in respect of the items of the property which are forthcoming have been delivered to each of the parties to whose share the item of property relating to the ownership has been allotted to and hold the said item of properties mentioned above into each party respectively and enjoy the same absolutely and forever.

4. The parties of the four parts further agree that all legal formalities which may be pending in respect of any matters

pertaining to “Hindu Undivided Family” properties and matters connected with the said *Satpal Sitaram Malhotra* HUF including formalities in respect of Business, Bank Account etc. shall be completed by the Party of the first part viz. *Satpal Sitaram Malhotra*.

5. The parties of the four parts further agree that the Bank Accounts standing in the name of the said *Satpal Sitaram Malhotra* HUF shall hereafter be owned and accordingly signed by Shri *Satpal Sitaram Malhotra*, the party of the first part who was otherwise also signing the said Account as Karta of *Satpal Sitaram Malhotra* HUF.

7. The parties of the four parts further agree that all share certificates of the company standing in the name of the said *Satpal Sitaram Malhotra* HUF shall hereto after stand in the name of the party of the first part viz. *Satpal Sitaram Malhotra* and any dividends, bonus shares, etc., from aforesaid share certificates shall accrue to the party of the first part viz. *Satpal Sitaram Malhotra*.

8. The parties of the four parts further agree that all pending and further liabilities of contingent nature or otherwise of Income Tax and Wealth Tax pertaining to the said *Satpal Sitaram Malhotra* HUF shall be borne by the party of the first part viz. *Satpal Sitaram Malhotra* and all taxes, liabilities and public charges hereto after in respect of any items of the property belonging to the said *Satpal Sitaram Malhotra* HUF so far, shall be borne by the party of the first viz. *Satpal Sitaram Malhotra* by virtue of oral partition effected on 29.3.85.

9. The parties of the four parties have accepted this unequal partition out of their free will without any coercion, and it is final and binding upon each of them.

10. On the basis of the oral partition effected on 29.3.85, this memorandum of partition is drawn up by the parties of the four parts in the presence of the two witnesses who have subscribed their signatures thereto in order to signify the correctness of the facts mentioned above and in the schedule

annexed hereto."

15. Though the document is titled as memorandum of partition, however, it appears that the second paragraph which reads as under:

"And whereas the said Hindu Undivided Family's assets consist of various properties as on date as per Schedule-A annexed herewith. The parties of the four parts further agree that whereas the parties of the four parts had previously decided to convert their property at S. No.31, Village Bhose, Taluka-Mahabaleshwar, Distt. Satara from Capital Asset into Stock in Trade as on 13th April 1980 and whereas on account of various Govt. Litigations & impediments they have now mutually decided to revert back the position of the aforesaid property to capital assets hereafter."

appears to treat properties in Schedule-A as joint family properties on the date of execution of a memorandum of partition.

16. Paragraph No.1 also indicates that the properties stand fully partitioned from the date of the memorandum of partition. Clause 3 of the document is crucial in interpreting the document. The expression 'hereby' in Clause 3 indicates that parties, by the said document, released their interest in the properties allotted to other parties and conveyed their right, title and interest to each of them separately. Therefore, it appears that by the said document, parties effected partition. Therefore, even though the document is entitled 'memorandum of partition', the document is, in fact, a 'partition deed'. Therefore, the document should be impounded in exercising power under section 33 of the Maharashtra Stamp Act, 1958.

17. Dr. Tulzapurkar, learned Senior Advocate for the petitioners, submitted that the document admitted in evidence is a copy of the original instrument. Therefore, the bar under section 35 is not applicable to the original document. However, the question which requires adjudication is whether the instrument directed to be impounded is an original instrument. Once the defendants are directed to produce an original instrument and such original instrument of memorandum of partition is produced on record, the document admitted in evidence that the verified copy loses its significance in the exercise of power under section 33 of the act. The Court, exercising power under section 33, will deal with the original instrument sought by the petitioners in their application. The original instrument being instrument under section 2(14) of the Maharashtra Stamp Act, 1958, marking of verified copy as exhibit and admitting it in evidence will have no consequence on the power of the Court under section 33 of the said Act to issue direction to impound insufficiency marked memorandum of partition.

18. Learned advocate for the respondent relied on following judgment in the case of **Shyamal Kumar Roy vs. Sushil Kumar Agarwal** reported in (2006) 11 SCC 331. The Apex Court, in the said case, was considering the interpretation of section 36 of the Indian Stamp Act, 1899, as amended in the State of West Bengal. In the facts of the case, the document in question was allowed to be admitted in evidence with an endorsement that "objected, allowed subject to objection". Therefore, the Apex Court in the said case held that the right to object remains open and can be

judicially determined at the appropriate stage of the suit.

19. The next judgment of the Apex Court relied on behalf of the respondent in the case of **Javer Chand And Others vs. Pukhraj Surana** reported in AIR 1961 SC 1655. The Apex Court was considering a question as to whether two hundis sued upon were admissible in evidence or not. The Apex Court was considering section 36 of the Bombay Stamp Act and held that the section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called into question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception the section recognises is the class of cases contemplated by section 61. Hence, once the Court rightly or wrongly decides to admit the document in evidence, the matter is closed so far as the admissibility is concerned. In my opinion, there cannot be a dispute about the legal proposition laid down by the Apex Court. However, as observed earlier, section 36 prohibits questioning of admission of the document in evidence, and it in no way affects the power of authority or the Court to impound a document under section 33 when the insufficiently stamped document is produced before the Court.

20. In so far as the document in the case of **Durgashankar S. Trivedi & Ors. vs. Babubhai Bhulabhai Parekh** reported in 2004 Vol. 106 (1) Bom.L.R. 219 is concerned, this Court held that merely because parties are allowed to produce document along with affidavit, it cannot be construed that such documents are to

be exhibited without contesting admissibility of said document. This Court further held that the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The objection needs to be raised before exhibiting the document. However, as observed in the case of **Javer Chand And Others** (supra), the bar under section 35 operates only regarding admission of such document in evidence. Admission of documents in evidence cannot be called into question at any stage of the suit. Power to impound conferred under section 33 is not taken away under section 35 of the Maharashtra Stamp Act.

21. In so far as the judgment of this High Court, Nagpur Bench in the case of **Babybai W/o Pandurang Madankar vs. Ghelabhai Narayanji Sakariya** decided on 17th March 2020 is concerned, it is held that the Court cannot go behind the order of admission in evidence and again consider the admissibility of the document. The observations made by the learned Single Judge were in the context of re-examining the admissibility of the document in evidence on the grounds of insufficiency of stamp. The Court did not consider the effect of section 33 or the power conferred under section 33 of the Maharashtra Stamp Act.

22. The reliance placed on a letter dated 12th April 1985 has no relevance while construing the instrument of memorandum of partition dated 30th March 1985, as according to the *respondents*, the memorandum of partition is evidence of past transactions of partition.

23. In the above view of the matter as well in view of the fact the document required to be stamped but the court as well the parties missed to notice it and the document was admitted in evidence and marked as an exhibit. It must, therefore, be presumed that the document was marked and taken in evidence by the court because the court did not see any ground not to take that document in evidence for non-compliance of provisions of the Stamp Act. The document was not only marked as an exhibit by putting an endorsement on it but was also stated to have been taken into evidence during cross examination, hence there can be no doubt that the document was admitted in evidence as requiring deficit stamp without judicial determination on deficit stamp duty. The contention, therefore, raised on behalf of the respondents that the trial court had no power to pass an order for impounding the document under the above Section 33 of the Act has no merit and must be rejected.

24. Hence, the following order:

- a) The impugned order dated 18th July 2023 passed by Joint Civil Judge, Senior Division, Pune, in Special Civil Suit No.1254 of 2014, is quashed and set aside.
- b) The application below Exhibit-354 is allowed.
- c) The memorandum of partition dated 30th March 1985 be forwarded to the Collector of Stamp for impounding the same by keeping a verified copy of the document on record.
- d) It is needless to state that the memorandum of partition dated 30th March 1985 (Exhibit-299) has been

VAIBHAV
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admitted in evidence, and therefore, it would not be open for the petitioners to question the admission of such instrument in evidence at any stage of suit or proceeding on the ground that it has not been duly stamped.

25. The writ petition is disposed of in the above terms.

26. At this stage, learned Senior Advocate for the respondents seeks stay of the order. Considering the point involved, the effect of the order is stayed for a period of six weeks from today.

(AMIT BORKAR, J.)

Note:- This order is modified as per order dated 17th October 2023. The corrections in paragraph Nos.9, 14, 22 and 24 are shown in italicize.